No. 09-958

APR 30 2010

In the
Supreme Court of the United States

DAVID MAXWELL-JOLLY, DIRECTOR OF THE DEPARTMENT OF HEALTH CARE SERVICES, STATE OF CALIFORNIA,

Petitioner,

v.

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., A NONPROFIT CORPORATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF FOR PETITIONER

The Ninth Circuit held that the Supremacy Clause creates a private cause of action to enforce 42 U.S.C. § 1396a(a)(30)(A), even though this Court has held that only Congress can create a cause of action to enforce federal law; even though this Court has held that the Supremacy Clause does not create any rights; even though the circuits agree (and respondents do not dispute) that § 1396a(a)(30)(A) does not create any rights enforceable by private parties; and despite evidence that Congress intended a federal agency, not private individuals, to enforce the provision. And the court held that California Welfare and Institutions Code § 14105.19(b)(1) may be enjoined based on judicially created procedural requirements that do not appear in § 1396a(a)(30)(A), even though states may be liable under Spending Clause statutes only where Congress has "unambigously" imposed funding conditions. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981). Review is needed to remove the atextual, budget-busting requirements engrafted by the Ninth Circuit onto the Medicaid Act, and to clear the growing confusion that its rulings have caused.

Recent developments further support review. On March 3, 2010, the Ninth Circuit panel that decided the present cases (*Independent Living II* and *III*) issued four new decisions affirming three injunctions (*California Pharmacists II*, *Independent Living IV*,

and *Dominguez*), and reversing denial of a fourth (*California Pharmacists III*).[1] These decisions added yet more atextual requirements including, *inter alia*, that any study of a reduction's anticipated effects occur not just pre-implementation but also *pre-enactment*; that the *Legislature* rather than a state agency conduct the study if the reduction is statutory; and that there be evidence that the Legislature actually considered the study, so that merely demonstrating that the study was prepared *for* the Legislature or that it was *listed on a legislative committee agenda* does not suffice. These decisions are the subject of a new petition, No. 09-1158, that raises the same questions presented here.

The Court should grant the present petition. Respondents' arguments in opposition range from insubstantial to specious. But if the Court prefers to reach the full panoply of "study" requirements now imposed by the Ninth Circuit, then it should grant the later-filed petition and hold the present one.

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[1] *See Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 596 F.3d 1098 (9th Cir. 2010); *Dominguez v. Schwarzenegger*, 596 F.3d 1087 (9th Cir. 2010); *Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, No. 09-55692, 2010 WL 737650 (9th Cir. Mar. 3, 2010).

I. The Court Should Review the First Question Presented

The Court should grant review to clarify the circumstances in which a private party may enforce a Spending Clause statute. Under the Ninth Circuit's theory, anyone can enforce any federal statute simply by alleging a conflict with a state statute. Congressional intent, whether to create or preclude such a right of action, is irrelevant.

1. Allowing private parties to enforce federal Spending Clause provisions, irrespective of Congressal intent, represents a dramatic rejection of Court precedent. "[W]ithout [such intent], a cause of action [to enforce federal law] does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001). Regardless of the theory advanced – preemption, implied rights, or § 1983 – the legal viability of such private challenges has always turned on Congressional intent. *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 95 (1983) ("In deciding whether a federal law preempts a state statute, our task is to ascertain Congress' intent in enacting the federal statute at issue."); *Cort v. Ash*, 422 U.S. 66, 78 (1975); *Gonzaga Univ. v. Doe,* 536 U.S. 273, 283-86 (2002).

Respondents do not address Congressional intent because they lose if it is considered. The circuit courts uniformly have found no Congressional intent to

permit private enforcement of § 1396a(a)(30)(A) in cases decided under § 1983, *see* Pet. 6-7, 19, and respondents do not argue that these cases were wrongly decided. And they do not dispute that Congress repealed the Boren Amendment to stop private challenges to the adequacy of Medicaid rates. *See* H.R. Rep. No. 105-149, at 591 (1997). Because Congress intended agency review to be the "central means of enforcement" of § 1396a(a)(30)(A), *Long Term Care Pharmacy Alliance v. Ferguson,* 362 F.3d 50, 58 (1st Cir. 2004), courts should not permit preemption claims to proceed in defiance of such intent.

2. Rather than grapple with this precedent, respondents contend only that the Supremacy Clause creates their lawsuit. This position conflicts with this Court's holdings that only Congress may create a cause of action to enforce federal law, *Sandoval*, 532 U.S. at 286, and that the Supremacy Clause does not create "rights." Pet. 20 (collecting cases).

Respondents assert that their theory is well-anchored in Court precedent, but it is not. The Court has never held that a private party has a preemption claim where a federal statute has been held unenforceable under § 1983, let alone where there is no Congressional intent to permit private enforcement. And the Court has never authorized such private suits in the face of contrary statements of

Congressional intent of the type that accompanied the Boren Amendment's repeal.[2]

Shaw v. Delta Air Lines and *Verizon Maryland Inc. v. Public Service Commission*, 535 U.S. 635 (2002), addressed the courts' jurisdiction over preemption cases, not the nonjurisdictional question of the legal insufficiency of plaintiffs' claims. Petitioner agrees that the federal courts have jurisdiction pursuant to 28 U.S.C. § 1331, which is why petitioner removed the lawsuit from state court.

The Court's observation, in *Golden State Transit Corp. v. City of Los Angeles,* 493 U.S. 103 (1989), that preemption claims may exist even where there is no right under § 1983 was, of course, dictum. *Golden State* held that the National Labor Relations Act *did* create rights enforceable under § 1983. 493 U.S. at 109. Accordingly, it did not address whether a preemption claim could proceed absent such a right, let alone when Congress intended to preclude private enforcement. Moreover, unlike *Golden State*, this case arises in a Spending Clause context, and therefore falls under this Court's Spending Clause decisions, such as *Pennhurst* and *Gonzaga*, with the limitations on private enforcement recognized therein.

Respondents note that, in his dissenting opinion in *Golden Gate*, Justice Kennedy wrote that

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[2] These facts distinguish every case that respondents cite, whether from a "business," Spending Clause, or Medicaid context. Opp. 18-22; Int. Opp. 29-30.

preemption does not require a "right," but rather is an "immunity" from compliance with "a state or local regulation" that is invalid because the federal government has regulated in the area. 493 U.S. at 113, 117 (Kennedy, J., dissenting). But this lawsuit does not involve a private party's attempt to assert an immunity defense to state regulation; rather it seeks to use the Supremacy Clause as a sword to force the State to spend more money. *See id.* at 118-19 (contrasting regulatory preemption with the type of claim asserted in *Maine v. Thiboutot*, 448 U.S. 1 (1980)). That the "target" of a state regulatory effort may be able to "raise a preemptive defense in the form of a suit for injunctive or declaratory relief. . . . does not mean that a third party can bring a freestanding preemption claim to enforce compliance with federal law, as if 'preemption' were a cause of action." *Wilderness Soc'y v. Kane County*, 581 F.3d 1198, 1233 (10th Cir. 2009) (McConnell, J., dissenting), *reh'g granted*, 595 F.3d 1119 (10th Cir. 2010). The cause of action recognized by the Ninth Circuit does not fit within this "immunity" conception for yet another reason: the court did not merely enjoin the statute but awarded relief identical to that available under § 1983, including "retroactive . . . monetary damages." Pet. App. 37, 43-44, 47.

Authorizing a preemption claim would not "vindicate the federal interest in assuring the supremacy of th[e] law," *Green v. Mansour*, 474 U.S. 64, 68 (1985), but undermine it. Any federal interest is advanced only by limiting enforcement to the

central means intended by Congress: agency review and the potential withholding of funding. 42 U.S.C. § 1396c.

3. Enough circuits have now made the same set of errors – misreading this Court's precedent as having already resolved this issue, permitting claims like the present one to proceed – to merit review. Pet. 21-22, 24-25. Respondents do not address this argument, focusing instead on the split with the Eleventh Circuit.

Respondents' efforts to distinguish *Legal Environmental Assistance Foundation, Inc. v. Pegues*, 904 F.2d 640 (11th Cir. 1990), are unavailing. That case, too, involved a private party's invocation of the Supremacy Clause to supplement enforcement provisions created by Congress. But the court explained that Congress, as the entity that creates statutory rights and obligations, is also the entity to determine "'who may enforce them and in what manner,'" and that *Cort v. Ash* supplies the means for discerning that intent. 904 F.2d at 644. And it rejected plaintiffs' efforts to misconstrue *Shaw v. Delta Air Lines* as doing more than identifying a jurisdictional basis for such claims. *Id.* at 643.[3]

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[3] *BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Servs., Inc.*, 317 F.3d 1270 (11th Cir. 2003), did not mention or overrule *Pegues*; applying *Verizon*, the court simply held that there was jurisdiction over plaintiff's claim. 317 F.3d at 1278-79.

4. Recent developments confirm the need for review. As set forth in the appendix to the petition in *California Pharmacists*, No. 09-1158, as of March 24, 2010, petitioner was aware of 38 Supremacy Clause lawsuits (compared to 34 when the present petition was filed), including new lawsuits in California, Kansas, and New York, and two new injunctions entered in California. Yet another § 1396a(a)(30)(A) lawsuit was filed while this reply brief was being written. *Hospital of Barstow, Inc. v. DHS*, No. 34-2010-80000522 (Cal. Super. Ct. (Sacramento)). Lost Medicaid savings are fast approaching $1 billion, with over $35 million in additional lost savings each month the existing injunctions remain in effect.

5. This is an appropriate vehicle. Although payments required by the injunction may be completed this summer, the case will not become moot because the State can recoup overpayments made to Medicaid providers by law. Cal. Welf. & Inst. Code §§ 14176, 14177.[4] The case is not set for trial until February 2011, and a stay may be obtained if the Court grants review. Sup. Ct. R. 23.1; 28 U.S.C. § 1651(a).

No independent state law basis exists for the Ninth Circuit's decision. The present case asserts only a federal cause of action, Opp. 4-5; Int. Opp. 23, and therefore will stand or fall on what this Court holds. *Mission Hospital Regional Medical Center v.*

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[4] Petitioner's contentions on this issue have never "shifted."

Shewry, 85 Cal. Rptr. 3d 639 (Cal. Ct. App. 2008), *review denied,* relied on the erroneous Ninth Circuit holdings of which the State now seeks review, in permitting mandamus enforcement of a different Medicaid provision.[5] The California Supreme Court has not considered whether § 1396a(a)(30)(A) imposes any mandamusable duties. It does not: state mandamus requires, *inter alia*, that petitioner have a "clear, present, and beneficial right . . . to the performance of" the duty to be mandated, a right that does not exist under § 1396a(a)(30)(A). 8 Witkin, *Cal. Proc.* § 74, at 954 (5th ed. 2008); *People v. Olds*, 3 Cal. 167, 175 (1853) ("[M]andamus can give no right . . . although it may enforce one.").

II. The Court Should Review the Second Question Presented.

The Court also should review whether a court may enjoin a state law based on purported requirements that neither Congress nor any federal agency created. The Ninth Circuit held, *inter alia*, that the State must study the impact of any amended rates on the § 1396a(a)(30)(A) factors before implementing them, and consider providers' costs to ensure that reimbursement rates bear a reasonable relationship to those costs. But § 1396a(a)(30)(A) only requires, at

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[5] Petitioner has never conceded that § 1396a(a)(30)(A) may be enforced in mandamus. The quoted language from petitioner's *Mission Regional* brief merely described the question then before the Court.

most, that rates not be set so high as to be inefficient or uneconomical, or so low as to create an access or quality of care problem for beneficiaries. It leaves the "methods and procedures" for achieving those objectives to the states. Subjecting states to massive liability for failure to comply with ever-expanding judicially created criteria conflicts with *Pennhurst*'s holding that Congress must unambiguously set forth the terms of federal grants.

1. Respondents do not generally dispute the atextual nature of the requirements imposed by the Ninth Circuit, arguing instead that the injunction was supported by the Ninth Circuit's "alternative" holding that reductions cannot be based on budgetary considerations, regardless of whether the rates substantively comply with § 1396a(a)(30)(A). But § 1396a(a)(30)(A) does not address, let alone limit, the role of budgetary considerations in setting Medicaid rates.

The courts below did not reach the State's evidence of substantive compliance because, in their view, it was developed too late to satisfy a purported "procedural" requirement that any study occur *before* a rate reduction is implemented. Pet. App. 11-12 & n.9. That evidence, set forth in 18 declarations, demonstrated that the rates *were* adequate under § 1396a(a)(30)(A), and would compensate most efficient providers' costs. Pet. App. 167-86. The Ninth Circuit erred when it held that this evidence was impermissibly *post hoc* and that § 14105.19(b)(1) was preempted because the State failed to conduct certain

studies and had improper motives – even though § 1396a(a)(30)(A) says nothing about either issue.

The Ninth Circuit's speculation that the State may have violated § 1396a(a)(30)(A) substantively, Pet. App. 23, also was based on erroneous standards. Under its holding, rates may be enjoined if the State fails to demonstrate they bear a "reasonable relationship" to providers' costs, even if the State does not have access to cost data, and even if the State demonstrates (as it did) that the rates comply with the factors actually set forth in § 1396a(a)(30)(A). Pet. App. 11-12, 56. But § 1396a(a)(30)(A) does not require cost-based rates and it does not impose a data requirement.[6]

2. The First, Third, Fifth, Seventh, and Eighth Circuits disagree with the Ninth Circuit on all of these questions. Pet. 27-32. With the possible exception of the Eighth Circuit in *Arkansas Medical Society v. Reynolds*, 6 F.3d 519 (8th Cir. 1993), no other circuit has held that a reimbursement reduction may be enjoined on the basis of budget considerations, i.e., without regard to the State's evidence of substantive compliance. The Ninth Circuit stands alone in its requirement of a pre-enforcement study;[7]

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[6] That "at least some Medi-Cal providers" have stopped treating Medi-Cal beneficiaries, Pet. App. 23, does not establish a violation: petitioner demonstrated that sufficient (and more efficient) providers would remain to serve Medicaid recipients.

[7] *Arkansas Medical Society*, respondents' best case, did not require a formal study, nor did it involve a statutory reduction.

(Continued on following page)

its requirement that rates bear a reasonable relationship to providers' costs;[8] and its holding that § 1396a(a)(30)(A) imposes a purely "procedural" obligation that, if breached, may support an injunction regardless of whether the rates substantively comply.[9]

3. There is no vehicle problem. Intervenors' preservation argument is specious. Petitioner argued that "Section (a)(30)(A) Does Not Require Either The Legislature Or The Department To Conduct A Study Or To Establish Cost-Based Reimbursement Rates," an argument that the Ninth Circuit acknowledged but rejected in its opinion. Respondent-Appellant Brief and Request for Oral Argument at 4, 25-31, No. 08-56422 (9th Cir. Oct. 14, 2008); Pet. App. 15-24.

And, in *Minnesota HomeCare Association v. Gomez,* 108 F.3d 917 (8th Cir. 1997), the same circuit affirmed summary judgment for the State in a challenge to a statutory (i.e., not agency-initiated) reduction even though no formal study was conducted.

[8] Contrary to respondents' arguments, the United States government has rejected such requirements. *See* Pet. 31-32. Respondents' reliance on briefing in *Alaska Dep't of Health & Soc. Servs. v. CMS*, 424 F.3d 931 (9th Cir. 2005), is ironic: that case involved the process envisioned by Congress (judicial review of agency action), and the state plan amendment (SPA) there was disapproved because payments were too high.

[9] Respondents strain to distinguish Fifth and Seventh Circuit cases construing § 1396(a)(30)(A) on the basis that they considered "equal access" rather than other § 1396a(a)(30)(A) factors, but the courts' analyses did not turn on which provision plaintiffs were trying to enforce.

The pending administrative proceedings to review California's proposed SPA underscore, rather than undercut, the need for review. This petition contends, after all, that private parties should not be able to interject the courts into Medicaid ratemaking before HHS has discharged its duties. The detail in the HHS letter to which intervenors cite confirms the substantive nature of that agency's review – a type of in-depth, cooperative review by the designated agency with appropriate expertise that no court has the resources or background to replicate. Action by HHS will not moot the petition given the inevitable appeals and the potential for judicial review at the request of either side. *See* 42 C.F.R. §§ 430.38, 430.60 et seq.; *Indep. Acceptance Co. v. State*, 204 F.3d 1247 (9th Cir. 2000).[10]

4. The interlocutory nature of the underlying order is no impediment given the national importance of the issues and their purely legal nature. Pet. 37. The Ninth Circuit has made clear that it will not revisit its central holdings through its denials of four separate petitions for rehearing and rehearing en banc in *Independent Living I, II,* and *III,* and *California Pharmacists I.*

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[10] HHS is not primed to "disapprove" SPA 08-009B1; DHCS has been in constant communication with HHS; has submitted some materials requested by the agency; and the SPA is currently "off the clock" by agreement with CMS.

CONCLUSION

For the foregoing reasons and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted

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